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In The

Supreme Court of the United States

October Term 1971

No. 71-5097

HAROLD EUGENE HUFFMAN,

Petitioner,

vs.

FAYE I. BOERSEN,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nebraska

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

Nebraska's requirement of a cost bond, in its Application to Huffman, denies him due process and equal protection of the law, since it denied him access to Nebraska's Supreme Court solely upon the basis of his inability to post a bond.

Respondent argues (beginning at page 4 of her brief) that the State of Nebraska has the right to establish reasonable requirements to protect winning civil litigants on appeal against court costs. This proposition is incontestable, provided that the proper caveat is added to the proposition. That caveat, as laid down by this Court's opinion in *Lindsey v. Normet*, — U. S. —, 31 L. Ed. 2d 36, 53 (1972), is that these requirements must be "reasonably tailored to achieve these ends" and must be "uniformly and nondiscriminatorily applied." The bond requirement of the State of Nebraska, even if reasonable upon its face, runs afoul of this caveat as applied to an indigent, since it has the effect of totally barring him from the State's appellate court.

Respondent says that *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949), disposes of this case in her favor. In *Cohen* this Court had occasion to consider a challenge to a bond requirement upon its face, not a challenge to the constitutionality in application to an indigent. This Court made precisely that distinction of *Cohen* in *Boddie v. Connecticut*, 401 U. S. 371, 381, fn. 9, where it said that:

> "We think Cohen v. Beneficial Finance Corp., 337 U. S. 541 (1949), has no bearing on this case. Differences, between divorce actions and derivative actions aside, unlike Cohen, where we considered merely a statute on its face, the *application* of this statute here operates to cut off entirely access to the courts."

Cohen is distinguishable upon another basis. *Cohen* does not address itself to the validity of a cost security required to protect the adverse party in litigation. Rather

in *Cohen*, the bond required was to be posted by the shareholders suing on behalf of their corporation to protect the corporation, the party in whose behalf they acted, from loss which would result if the suit was unfounded. This distinguishing factor enervates *Cohen* of precedential value in the context of a bond required to protect the adverse party to the litigation. This distinction was noted by the Court in *Lindsey v. Normet*, 31 L. Ed. 2d 36, fn. 26, wherein the court stated that:

> "Cohen v. Beneficial Finance Corp., 337 U. S. 541 (1949), is distinguishable from the instant case. There, the Court upheld a state law which required a shareholder who wished to file a shareholder's derivative suit but who owned less than 5% of the corporation's stock or whose stock was worth less than $50,000 to file as a precondition to bringing the suit a bond for the reasonable expenses, including attorney's fees, that might be incurred by defendants. The security requirement there applied to a *plaintiff* and its purpose was to protect the corporation from being injured by 'strike suits' which harmed the very interests that plaintiffs claimed to be protecting."

Respondent argues (at page 7 of her brief) that:

> "If the Court invalidates the appeal bond requirement herein without an alternative remedy, it is forcing the abandonment of the state's policy of protection of civil litigants or it is requiring the state to pay the winner out of state funds, or it is forcing the state to abandon the policy of taxing the court costs against the loser."

This argument is invalid on several grounds. Firstly, no claim is made that the requirement of a bond is unconstitutional on its face. Therefore, invalidation of the bond requirement is sought only insofar as it applies to

the indigent. In all other cases the State's bond requirement would still obtain. Nor, do we see how there would be any compulsion upon the State to pay the costs of the winner out of state funds. Nebraska, in common with most States, generally taxes costs in favor of the prevailing party on an appeal. When the appellant wins, costs are generally taxed in the appellant's favor. Nebraska does not require the appellee to post a bond to protect the appellant against costs. In cases where the appellant prevails, the absence of a bond requirement has not forced the State of Nebraska to abandon its policy of taxing the costs against the loser, nor has the State of Nebraska been required to pay the court costs of a winning appellant out of state funds.

In *Griffin v. Illinois*, 351 U. S. 12 (1956), this Court bottomed the indigent criminal defendant's right to free appeal, at least in part, upon the defendant's due process right to be heard in the trial court. The Court noted that once the initial right to access was established, if the appellate process was part of the total judicial process to adjudicate the type of issue involved, a party could not, upon the basis of inability to pay costs, be barred from the appellate process. In *Boddie v. Connecticut*, supra, this Court established the initial right to free access of a party seeking to have the marital relationship dissolved. *Boddie* and *Griffin* in tandem then would mandate the extension to a party in a matrimonial proceeding of the right to a free appeal required by *Griffin*.

However, respondent seeks to distinguish *Boddie* upon the basis that, while the party seeking a divorce has a fundamental right to access to the courts, the other

party to the marital relationship, if he seeks to defend the bond of matrimony, has no such fundamental right. Thus, respondent (at page 8 of her brief) argues that:

> ". . . Does Harold Huffman have a fundamental right to litigate the validity of his marriage to Faye Boersen on appeal? What Harold Huffman seeks to maintain in this action is an alleged marriage to a woman that won't live with him even after he finishes his term in the Nebraska Penal Complex. This would not appear to be the type of 'fundamental' right that the Court should seek to protect by guaranteeing an appellate hearing."

The fundamental right which *Boddie* sought to protect was the right of access to the courts to litigate "the adjustment of a fundamental human relationship", matrimony, which only the courts of the State could grant. Each party to the marriage is a party to the fundamental relationship or else there would be no relationship but only a status. Only the courts of a state may say that the relationship exists or does not exist. Just as there is no tribunal other than a state court which can dissolve a marriage, there is no tribunal other than a state court which can establish that a matrimonial relationship exists. The marriage relationship is no less a fundamental human relationship, when a party desires that it continue, than it is when a party desires that it be terminated.

Respondent argues (at pages 10 and 11) that *Lindsey v. Normet*, supra, indicates that the doctrine of *Griffin v. Illinois*, supra, should not be extended to civil litigation. This is a complete misreading of *Lindsey*. *Lindsey* recognized the validity of "reasonable procedural provisions

to safeguard litigated property, . . . or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied . . ." (31 L. Ed. 2d at page 53). However, the Nebraska cost bond provision serves neither of the purposes validated by *Lindsey*, nor is it nondiscriminatorily applied. The provision does not safeguard property in litigation, nor does it guard a damage award already made, but rather seeks only to protect an appellee from costs which may be awarded, if the appellant does not prevail on appeal. Nor, is the cost bond provision tailored to discourage patently insubstantial appeals. Rather, the same vice inheres in it which inhered in the double bond provision in *Lindsey*. As this Court noted in *Lindsey*:

> "The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." (31 L. Ed. 2d at p. 53).

Other statements which the Court made with regard to the double appeal bond are applicable by analogy here. Thus, at a later point in its opinion this Court stated that:

> "In the case before us, however, the State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment. Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action. The discrimination against the poor, who could pay their rent pending an

appeal but cannot post the double bond is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." (31 L. Ed. 2d at pages 53 and 54).

Respondent argues (at page 10) that to allow free appeals to those who are unable to pay constitutes a discrimination against those who can pay, who are, therefore, required to do so. That a discrimination is involved in such a situation can hardly be doubted. However, the Equal Protection Clause does not condemn discrimination, but only invidious or unreasonable discrimination. *Linsley v. Natural Carbonic Gas Company*, 220 U. S. 61, 78 (1911); *McLaughlin v. Florida*, 379 U. S. 184, 188-192 (1964). A requirement of payment does not bar those who can pay from utilizing a state service for which a charge is made. However, such a requirement does bar one who has no money from utilizing the service. The interest of the state in recouping the cost of services which it provides is strong enough to justify a requirement of payment, where ability to pay exists, without being strong enough to justify a requirement of payment, where payment is impossible. This is the burden of cases such as *Griffin v. Illinois*, and its progeny, which have condemned various state cost requirements in criminal cases as discriminatory when applied to the poor, but which have not voided such requirements upon their face. Discrimination there may be if some pay and others do not, but, if the discrimination is based upon the fact that some can pay while others cannot, is not unreasonable.

Respondent further argues (at page 10) that if the right to a free appeal (fees and cost security) is extended

to the indigent in civil cases then perhaps the states will be required to subsidize counsel for the poor in civil litigation and that all state charges for services such as tuition, license fees, and the like may be in jeopardy. This potential jeopardy arose when this Court recognized that discrimination based upon poverty was impermissible in *Griffin v. Illinois*, supra, and *Harper v. Virginia*, 383 U. S. 663 (1966). When the payment of any one fee was condemned, the potential arose that the payment of all fees might be condemned. If the argument that extending a free appeal to the indigent in civil cases might one day lead to the invalidation of all state charges for services is a valid ground for not extending *Griffin* and *Harper*, it was equally a valid ground for not deciding *Griffin* and *Harper* the way they were decided. The *in terrorem* argument that the extension of one service for free may ultimately lead to a requirement that all services be extended for free, is as applicable to the rulings in *Griffin* and *Harper*, as it is to the ruling petitioner seeks in this case.

However, the condemnation of all fees does not follow with ineluctable logic from the condemnation of any one fee. A line may have to be drawn between those instances in which equal protection does require the State to extend free services to the indigent, and those in which it does not. However, that a line needs to be drawn does not establish in any particular case on which side of the line a service falls.

If the line needs to be drawn now, which we doubt, it can be drawn by analogy to this Court's rulings in *Harper v. Virginia*, supra, and *Shapiro v. Thompson*, 394

U. S. 618 (1969). In each of these cases this Court condemned a classification in a statute because of its substantial deterent impact on the exercise of a fundamental right. A line based upon the fundamental character of the right denied to an indigent person because of inability to pay would provide one rational way of limiting the operation of the principle which condemns discrimination based on poverty. Because of the central role which the courts play in our political system, access to the courts is a fundamental right. It is the legal analogue to the franchise, and its exercise deserves the same protection from discrimination based upon poverty as does the exercise of the franchise. As Mr. Justice Black observes in his opinion dissenting from this Court's denial of certiorari in *Meltzer v. C. Buck LeCraw & Co.*, — U. S. —, 29 L. Ed. 2d 124, 125 (1971):

> "In my view, the decision in Boddie v. Connecticut can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty or afford to hire an attorney."

Respondent, throughout her brief, argues in terms of the extension of a free right of appeal to the indigent and we have dealt with the argument in that vein. However, the issue here is not whether the indigent's right to appeal should be free or not, but whether prepayment should be a condition to the right to appeal. The equal protection bars the imposition of a hurdle, such as payment in advance, to the extent that it bars the indigent from the appellate courts. However, the Equal Protection

Clause does not bar States from creating reasonable alternative procedures to assure payment of costs by indigent parties. In Nebraska, as in most States, costs partake of the nature of a judgment and are collectable in the same manner as any other judgment. Appellants, who prevail on appeal in the Nebraska courts, do not have the benefit of a bond requirement. However, they have means available to collect costs awarded to them. In addition to the ordinary means for collecting judgments, the States could adopt other steps to assure that indigent parties eventually pay costs awarded against them, or at least to protect appellees against the loss occasioned by an indigent appellant's failure to pay such costs. On page 14 of her brief, respondent notes at least two methods which might be utilized to protect an appellee from costs. One is the simple expedient of allowing the appellee, in a case where a cost bond is not required in advance, to file a typewritten brief, since printing costs are the principal costs involved in an appeal in Nebraska. Another potential method is installment payment. Other methods might suggest themselves to the State Legislatures, once they are faced with the reality that indigent parties are not required to post bonds in advance of an appeal.

II.

Contrary to the suggestion of respondent, this is a proper case in which to extend the Boddie principle to litigation between private parties on appeal.

Respondent argues that this is not a proper case in which to extend the *Boddie* principle because Huffman's appeal to the Nebraska Supreme Court was frivolous and

without merit. The claim that the appeal was frivolous is based upon a record made at an ex parte hearing at which Huffman had no opportunity to appear, in which he offered no evidence, and at which he was not represented by counsel. This Court should not, upon the basis of a record made up by only one party to the litigation determine that the other party could not make out a case if given an opportunity to do so.

In addition, the issue of paternity, contrary to respondent's suggestion, was determined by the Nebraska District Court, and Huffman has no alternative remedy available in which he could litigate the issue of paternity.

The right to bring an action under the Nebraska Child Born Out of Wedlock Statute (Sec. 13-113, R. R. S. 1943, Nebraska) is specifically limited to an action by the mother. In *Poltini v. Creel*, 169 Neb. 591, 100 N. W. 2d 736 (1960), the Nebraska Court held that the petition by a father for declaration of his parental status as to children born out of wedlock was a legal nullity because of a lack of specific statutory authority. If the sole purpose of the action is the determination of paternity, 13-113, supra, is literally applied.

However, in an action for annulment, the father may raise the issue of paternity and the court may make such determination.

In *Timmerman v. Timmerman*, 163 Neb. 704, 81 N. W. 2d 135 (1951), our Nebraska court held that the Nebraska annulment statute authorized the court to determine paternity where it had declared the marriage a nullity. At page 140 the court stated:

"By the terms of section 42-311, R. R. S. 1943, the court was specifically empowered, in the event that the marriage was decreed to be a nullity, to make provision for the care, custody, and maintenance of any child or children of the parties. It is but a matter of reason and logic to say that the power could not be exercised in the absence of proof of the fact that there was a child or there were children. It is likewise true that proof of paternity could be accomplished by admission of the father.

"The question arises, as applied to this case, as follows: Was the court empowered to determine the question of paternity other than by an adjudication made pursuant to section 13-106 or 13-113, R. R. S. 1943 . . .

"We think that the answer must be that the court had the power . . ."

For respondent to say that paternity cannot be considered because she did not raise the issue or "It was not intended to be an issue in the case . . ." (at page 12) is without substance. Once a plaintiff files an action, the law not the plaintiff establishes what issues can or cannot be litigated.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Nebraska Supreme Court dismissing Huffman's appeal should be reversed.

Respectfully submitted,

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April 10, 1972.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 1972, three copies of the Reply Brief for Petitioner were mailed, postage prepaid, to Vincent L. Dowding, Esq., P. O. Box 1192, Grand Island, Nebraska 68801, counsel for Respondent. I further certify that all parties required to be served have been served.

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